

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

227), and Defendants replied to Plaintiff's response on October 1, 2012 (Docket Entry No. 228). Now, for the reasons detailed more particularly below and pursuant to FED. R. CIV. P. 56(c)(2), Plaintiff moves to strike Exhibit F (Docket Entry No. 228-1) and Exhibit G (Docket Entry No. 228-2) to Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Docket Entry No. 228).

II. ARGUMENT & AUTHORITIES

In their Reply to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Docket Entry No. 228), Defendants rely on evidence that is plainly inadmissible. Therefore, it should be stricken from the record.

A. Wikipedia Entry

In their Reply to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Docket Entry No. 228), Defendants rely on a Wikipedia entry to show that certain evidence offered by Plaintiff in his Response in Opposition to Defendants' Motion for Summary Judgment (Docket Entry No. 227) is irrelevant and unreliable. *See*, Defs.' Reply to Pl.'s Resp. in Opp'n to Defs.' Mot. Summ. J. (Docket Entry No. 228) at p. 4. The Fifth Circuit has definitively held, however, that Wikipedia is "an unreliable source of information." *Li v. Holder*, 400 Fed. App'x 854, 857-58 (5th Cir. 2010) ("We discuss this issue separately only to express our disapproval of the [administrative law judge's] reliance on Wikipedia and to warn against any improper reliance on it or similarly unreliable internet sources in the future."); *Glanville v. Dupar, Inc.*, No. H-08-2537, 2009 U.S. Dist. LEXIS 88408, at *15 n.2 (S.D. Tex. Sep. 25, 2009) (Rosenthal, J.) ("Wikipedia is an inherently unreliable source."); *Performance Pricing*,

Inc. v. Google, Inc., 2009 U.S. Dist. LEXIS 71264, at *12 n.15 (E.D. Tex. Aug. 13, 2009); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) (“Any evidence procured off the internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception.”). Therefore, the Court should strike Exhibit F (Docket Entry No. 228-1) to Defendants’ Reply to Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment (Docket Entry No. 228).

B. Deposition of Joel Bradberry

In their Reply to Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment (Docket Entry No. 228), Defendants also rely on deposition testimony given by Joel Bradberry to establish that corrections “officers were not required to stay at the court house as is alleged by Bingham.” *See*, Defs.’ Reply to Pl.’s Resp. in Opp’n to Defs.’ Mot. Summ. J. (Docket Entry No. 228) at p. 7. However, Bradberry was not deposed in connection with this case. His deposition was taken in connection with a separate lawsuit currently pending against Defendant Jefferson County, Texas for violations of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335, (“USERRA”) and TEX. GOV’T CODE ch. 613. *See generally*, *Bradberry v. Jefferson Co., Tex.*, No. 1:11-cv-00258-KFG (E.D. Tex. filed May 25, 2011). That case is currently on interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b). *See generally*, *Bradberry v. Jefferson Co., Tex.*, No. 12-41040 (5th Cir. filed Sep. 20, 2012).

“A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action.” FED. R. CIV. P. 32(a)(8). Bradberry’s deposition was taken in the later action. And although the parties are the same in both lawsuits, Bradberry’s case involves alleged violations of USERRA and TEX. GOV’T CODE ch. 613—not the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (“FLSA”). The cases do share one thing in common, though: in both *Bradberry* and *Bingham*, the United States Department of Labor (“DOL”) investigated Jefferson County and found that it violated the law, but the county, at the urging of then Assistant District Attorney Tom Rugg, refused to take responsibility. However, this commonality is incapable of overcoming Rule 32(a)(8)’s prohibition against using the deposition testimony taken in *Bradberry* in this case. Therefore, the Court should strike Exhibit G (Docket Entry No. 228-2) to Defendants’ Reply to Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment (Docket Entry No. 228).

III. CONCLUSION

For the foregoing reasons, the Court should strike Exhibit F (Docket Entry No. 228-1) and Exhibit G (Docket Entry No. 228-2) to Defendants’ Reply to Plaintiff’s Response in Opposition to Defendants’ Motion for Summary Judgment (Docket Entry No. 228).

Respectfully submitted,

MOORE & ASSOCIATES

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October in the year 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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s/ Melissa Moore

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